AIZZ AMIDIE AZIZ & ORS v. PP

COURT OF APPEAL, PUTRAJAYA
NOR BEE ARIFFIN JCA
LEE SWEE SENG JCA
NORDIN HASSAN JCA
[CRIMINAL APPEAL NO: T-05-149-04-2020]
31 MARCH 2021

CONSTITUTIONAL LAW: *Courts – Jurisdiction – Refusal of High Court to allow application for referral of constitutional questions of law to Federal Court under s. 84 of Courts of Judicature Act 1964 ('CJA') – Appeal against – Whether High Court exercised discretion correctly – Whether decision of High Court to proceed to hear witness under s. 265A of Criminal Procedure Code and refusal to refer question of law to Federal Court 'decision' within meaning of CJA – Whether decision appealable before disposal of criminal trial – Whether merely ruling that did not finally dispose of rights of accused persons – Whether appeal incompetent and ought to be struck off*

CRIMINAL PROCEDURE: *Courts – Jurisdiction – Refusal of High Court to allow application for referral of constitutional questions of law to Federal Court under s. 84 of Courts of Judicature Act 1964 ('CJA') – Appeal against – Whether High Court exercised its discretion correctly – Whether decision of High Court to proceed to hear witness under s. 265A of Criminal Procedure Code and refusal to refer question of law to Federal Court 'decision' within meaning of CJA – Whether decision appealable before disposal of criminal trial – Whether merely ruling that did not finally dispose of rights of accused persons – Whether appeal incompetent and ought to be struck off*

The appellants were jointly charged in a criminal trial for an offence under s. 302 of the Penal Code for the murder of the deceased. During trial, the prosecution made an oral application for the procedure under s. 265A of the Criminal Procedure Code ('CPC') to be invoked for its next three witnesses. The High Court allowed the prosecution's oral application to continue with the trial by allowing the next three witnesses to give evidence in a protected manner without their identity being disclosed under s. 265A of the CPC and s. 20(1)(a) and (b) of the Witness Protection Act 2009. The appellants filed a notice of motion under s. 84 of the Courts of Judicature Act 1964 ('CJA') for the High Court to refer to the Federal Court a question of law that had arisen in the criminal trial with respect to the provision in the Federal Constitution ('FC') (i) whether s. 265A CPC that allows witnesses of the prosecution to be called to give evidence in a protected manner and without their identities being disclosed is inconsistent with arts. 5 and 8 of the FC that provide for equality before the law and entitled to equal protection under

the law and, therefore, is void under art. 4(1) and prejudicial to the appellants; and (ii) whether the High Court has the jurisdiction to decide on the constitutionality of a provision that had arisen in the course of a trial before it. The High Court was of the view that there was no necessity to refer the constitutionality of the provisions of the law to the Federal Court and that in any event, the High Court had jurisdiction to decide on it, which it did. The High Court held that the provision of s. 265A of the CPC was not unconstitutional and was valid. Thereafter, the High Court decided to continue to hear the next three witnesses in accordance with the protective manner under s. 265A of the CPC. The appellants appealed to this court against the decision of the High Court not to refer the constitutional issue to the Federal Court. The grounds of appeal to this court were: (i) whether the High Court Judge ('HCJ') erred in fact and in law when he made a finding and decision that there was no constitutional issue or special circumstance that allowed for a referral of the constitutional challenge to the Federal Court when clearly s. 265A of the CPC is inconsistent with the FC; (ii) whether the HCJ erred in fact and in law when he failed to refer the constitutional question to the Federal Court which has the jurisdiction to hear the constitutionality issue; and (iii) whether this court ought to set aside the High Court's decision and make an order for referral of the question of the constitutionality of the provision to the Federal Court or make such further order as it deems fit and reasonable in the interest of justice of the appellants.

Held (striking out appeal)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) Section 84 of the CJA gives the discretion to the High Court when a reference is made for referral of a constitutional question to the Federal Court. That the High Court certainly does not have to forthwith and immediately refer a constitutional question of law raised before it when it is exercising its original, appellate or revisionary jurisdiction is beyond debate. It can and in this case did proceed to dismiss the application for referral to the Federal Court under s. 84 of the CJA and continued with the criminal trial in the exercise of its original jurisdiction. That was a decision that the HCJ was perfectly entitled to arrive at. He may be right or wrong and the matter could certainly be raised on appeal at the end of the criminal trial when the judge decides on whether to convict or acquit. Having decided that there was no question arising as to the effect of any provision of the Constitution, he is then to continue with the proceedings before him, which he did and so he did not stay the proceedings. The HCJ had exercised his discretion correctly. His decision on the constitutionality of s. 265A of the CPC would in no way dispose of the case fully and finally and the right of the accused persons to appeal against the final decision of the High Court after trial would not be jeopardised in any way. (paras 47, 49, 50, 52, 53 & 55)

(2) The admission of the evidence under s. 265A of the CPC would mean that, together with the other evidence admitted, the High Court would have to weigh and consider if at the end of the trial the prosecution had proved its case beyond a reasonable doubt and that the conviction was safe. That final decision as to whether to convict or acquit on a lesser charge would be a final decision that disposes of the rights of the parties and thereafter the party dissatisfied with the decision may appeal to the Court of Appeal. In the current trial before the High Court, the prosecution had not closed its case yet when the objection was raised on what was said to be a rather unfair and unconstitutional procedure of allowing some witnesses to give evidence without their identity being disclosed and in the absence of counsel for the accused persons and the accused persons. The decision of the HCJ to dismiss the application of the appellants and to proceed with the trial, no matter how repulsive it may be to the appellants, at this stage, did not amount to an appealable 'decision' within the meaning of s. 50(1) read with s. 3 of the CJA. (paras 73, 86 & 87)

(3) Having found no error in the High Court's exercise of its discretion to dismiss the application under s. 84 of the CJA, the matter should be taken up in the fullness of time when the decision on the constitutionality of s. 265A of the CPC would subsume into the ultimate decision at the end of the trial that would finally dispose of the rights of the parties. In the event that the final decision is against the accused person as in a conviction of the same charge or even a reduced charge, the accused persons as appellants here are at liberty to appeal with no prejudice to their rights whatsoever in canvassing all arguments on both the inadmissibility of the evidence adduced under s. 265A of the CPC and the unconstitutionality of the provision. This appeal, being incompetent, must therefore be struck out. (paras 90-92)

Case(s) referred to:

Ah Thian v. Government of Malaysia [1976] 1 LNS 3 FC ***(refd)***
Ahmad Zubair Hj Murshid v. PP [2014] 9 CLJ 289 FC ***(refd)***
Alma Nudo Atenza v. PP & Another Appeal [2019] 5 CLJ 780 FC ***(refd)***
Assistant Commissioner Michael James Condonation v. Pompano Pty Ltd [2013] 252 CLR 38 ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [1999] 1 CLJ 537 CA ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 4 CLJ 265 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2010] 9 CLJ 625 FC ***(refd)***
Dato' Seri Anwar Ibrahim v. PP [2011] 7 CLJ 253 CA ***(refd)***
Dato' Sri Mohd Najib Hj Abdul Razak v. PP [2019] 1 LNS 1837 CA ***(refd)***
Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***
Gerald Fernandez v. Attorney-General, Malaysia [1970] 1 LNS 27 FC ***(refd)***
Kostovski v. The Netherlands (1989) ECHR 11454/85 ***(refd)***

A *Lim Guan Eng v. PP [2017] 1 LNS 1850 CA* ***(refd)***
Lim Hung Wang & Ors v. PP [2011] 7 CLJ 318 HC ***(refd)***
Maleb Su v. PP & Another Case [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 HC ***(refd)***
Mark Koding v. PP [1982] 1 LNS 15 FC ***(refd)***
PP v. Atik Hussain Abu Bakar & Other Cases [2016] MLJU 968 ***(refd)***
PP v. Datuk Hj Wasli Mohd Said [2015] 1 LNS 14 CA ***(refd)***
B *PP v. Gan Boon Aun [2017] 4 CLJ 41 FC* ***(refd)***
PP v. Letchumanan Suppiah [2009] 5 CLJ 652 FC ***(refd)***
PP v. Mohamed Shahabuddin Mohamed Ali & Ors [2018] 8 CLJ 535 CA ***(refd)***
R v. Mayers and Others [2008] EWCA Crim 2989 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 CA ***(refd)***
Tan Hoo Eng v. PP [2019] 1 LNS 893 CA ***(refd)***
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Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(1), (2), 84
Criminal Procedure Code, ss. 7, 51, 52, 112, 264, 265A
Dangerous Drugs Act 1952, ss. 37(d), (da), 37A
Federal Constitution, arts. 4(1), 5, 8
D Penal Code, ss. 302, 304, 377B
Witness Protection Act 2009, s. 20(1)(a), (b)

Coroners and Justice Act 2009 [UK], ss. 88, 89

For the 1st, 2nd & 3rd appellants - Sukri Hj Mohamed & Mellisa Sukri; M/s Wan Haron Sukri & Nordin
E *For the 4th & 5th appellants - Muhammad Solehuddin Hakimi Mohamad Johdi & Syed Muhammad Syafiq Syed Abu Bakar; M/s Hanif & Co*
For the prosecution - Samihah Rhazali; DPP

[Editor's note: For the High Court judgment, please see Aizz Amidie Aziz & Yang Lain lwn. PP [2021] 4 CLJ 496 (overruled).]

F *Reported by Suhainah Wahiduddin*

JUDGMENT

Lee Swee Seng JCA:

G **[1]** This appeal raises the question as to whether when a constitutional question of law is raised in the High Court and application is made for the referral of the question to the Federal Court, may the High Court refuse to refer the question and instead proceed with or continue with the criminal trial.

H **[2]** The issue is no doubt a novel one on whether s. 265A of the Criminal Procedure Code ("CPC") with respect to allowing a witness to testify without his identity being disclosed and in the absence of the accused and his counsel is unconstitutional in violation of arts. 5 and 8 of the Federal Constitution ("FC").

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[3] The High Court Judge had ruled in favour of the prosecution's oral application to hear a witness by way of s. 265A CPC in the murder trial of five accused persons.

[4] This appeal also brings to the fore the question of jurisdiction as to whether the decision of the High Court to proceed to hear a witness under s. 265A CPC and his refusal to refer the question of law to the Federal Court is a "decision" within the meaning of the Courts of Judicature Act 1964 ("CJA") that is appealable to the Court of Appeal or is it merely a ruling that does not finally dispose of the rights of the accused persons.

[5] In the case of the latter, the accused persons would have to canvass the issue as a ground of appeal should they be convicted for the offence or any lesser offence.

In The High Court

[6] The appellants are the accused persons in a joint criminal trial in Criminal Trial No.: TA-458-3-01-2018 dan TA-458-4-01-2018 in the High Court at Kuala Terengganu. On 25 July 2017 the appellants were charged jointly for an offence under s. 302 of the Penal Code and the charge in its original language reads as follows:

> Bahawa kamu, bersama-sama dua orang yang masih bebas, pada 21/6/2017, jam lebih kurang 4.40 petang sehingga 5.15 petang dl kawasan paya di tanah lapang Kg Pengkalan Nyireh, Kg Raja, di dalam daerah Besut, dalam negeri Terengganu, dalam melaksanakan niat kamu sebagaimana yang telah ditakrifkan dibawah seksyen 34 Kanun Keseksaan, telah membunuh Nik Mohamad Sharulanuar bin Nek Der, No. Kpt: 950206035161. Oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum dibawah seksyen 302 Kanun Keseksaan.

[7] The trial commenced on 11 November 2018 and after a year, a total of 19 prosecution witnesses had been called.

[8] Learned counsel for the accused persons was taken by surprise when the prosecution made an oral application for the procedure under s. 265A CPC to be invoked for its next three witnesses. They were even more startled when the learned High Court Judge allowed, on 26 November 2019, the prosecution's oral application to continue with the trial by allowing the next three witnesses to give evidence in a protected manner without their identity being disclosed under s. 265A CPC and s. 20(1)(a) and (b) of the Witness Protection Act 2009.

[9] According to learned counsel for the appellants, initially, they were not given an opportunity to object to the application and that they only knew of the decision of the learned High Court Judge on 26 November 2019 after an inquiry session by the judge.

[10] On 27 November 2019, before commencing cross-examination, the appellants once again raised their objection through their learned counsel. After hearing the submissions of the parties from both sides, the learned High Court Judge dismissed the objections raised and proceeded with the hearing of the witnesses in accordance with the provision of s. 265A CPC.

[11] On 19 January 2020, the appellants filed a notice of motion under s. 84 CJA for the High Court to refer to the Federal Court a question of law that had arisen in the criminal trial with respect to the provision in the FC as follows:

(i) Whether s. 265A CPC that allows witnesses of the prosecution to be called to give evidence in a protected manner and without their identities being disclosed is inconsistent with arts. 5 and 8 of the FC that provide for equality before the law and entitled to equal protection under the law and therefore is void under art. 4(1) and prejudicial to the applicants;

(ii) Whether the High Court has the jurisdiction to decide on the constitutionality of a provision that had arisen in the course of a trial before it.

[12] The learned High Court Judge was of the view that there was no necessity to refer the constitutionality of the provisions of the law to the Federal Court and that in any event, the High Court has jurisdiction to decide on it which it did. The High Court held that the provision of s. 265A CPC is not unconstitutional and is valid. Thereafter, the High Court decided to continue to hear the next three witnesses in accordance with the protective manner under s. 265A CPC.

[13] The applicants as appellants had appealed to this court against the decision of the High Court not to refer the constitutional issue to the Federal Court.

In The Court Of Appeal

[14] The grounds of appeal to this court are as follows:

(i) The learned High Court Judge erred in fact and in law when he made a finding and decision that there was no constitutional issue or special circumstance that allowed for a referral of the constitutional challenge to the Federal Court when clearly s. 265A CPC is inconsistent with the FC;

(ii) The learned High Court Judge erred in fact and in law when he failed to refer the constitutional question to the Federal Court which has the jurisdiction to hear the constitutionality issue;

(iii) That this court do set aside the High Court's decision and make an order for referral of the question of the constitutionality of the provision to the Federal Court or make such further order as it deems fit and reasonable in the interest of justice of the appellants.

Whether The Referral Under Section 84 CJA Is On A Question That Arises As To The Effect Of Any Provision Of Constitution That The High Court Has Jurisdiction To Decide

[15] When the provision of any law, whether Federal or State, is being challenged in any proceedings with respect to its constitutionality, it is important to ask which ground of challenge it is, based on the categorisation of the grounds of constitutional challenge in the Federal Court case of *Ah Thian v. Government of Malaysia* [1976] 1 LNS 3; [1976] 2 MLJ 112 as follows at p. 113 (MLJ):

> **Under our Constitution written law may be invalid on one of these grounds:**
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> (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
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> (2) *in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1)*; or
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> (3) in the case of State written law, because it is inconsistent with Federal law, article 75.
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> *The court has power to declare any Federal or State law invalid on any of the above three grounds.*
>
> *The court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any court in the land and in any proceeding whether it be started by Government or by an individual.*
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> (emphasis added)

[16] It is only with respect to ground (i) that the High Court has no jurisdiction to hear the constitutionality challenge. Thus, the Federal Court in *Ah Thian*'s (*supra*) further explained at p. 113 (MLJ) as follows:

> But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.
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> *First, clause (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:*

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(a) in proceedings for a declaration that the law is invalid on that ground; or

(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or

(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

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It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for anyone to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way.

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Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, clause (4) of article 4 provides that proceedings of the type

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mentioned in (a) above may not be commenced by an individual without leave of a judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant Government an opportunity to argue to the contrary.

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Thirdly, clause (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other court has it. This

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is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest court in the land.

(emphasis added)

[17] In *Ah Thian*'s case (*supra*) the challenge was on the constitutionality of a Federal law in relation to crime and criminal procedure and certainly

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not a dispute over whether it was a matter for Parliament or the State Legislature to enact the Firearms (Increased Penalties) Act and the Federal Court explained the position at p. 113 (MLJ) as follows:

The applicant wants to attack the validity of the Firearms (Increased Penalties) Act not on the ground that it relates to a matter with respect

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to which Parliament has no power to make law. In my judgment, *this Act deals with criminal law and the administration of justice, both matters with respect to which Parliament has power to make law (see item 4 of List I in the Ninth Schedule to the Constitution). The applicant says that the Act is invalid because it is inconsistent with the Constitution, ie, on ground (2) set out in paragraph 9 above.* Therefore clause (4) of article 4 and clause (1) of article 128 do not apply

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and *the point may be raised in the ordinary way in the course of submission, and determined in the High Court, without reference to the Federal Court, and there is no need for leave of a judge of the Federal Court.* (emphasis added)

[18] Likewise here, s. 265A CPC is a Federal law with respect to criminal procedure and it reads:

265A. Special provisions relating to protected witness

(1) Notwithstanding section 264, where at any time during any trial, any of the witnesses for the prosecution refuses to have his identity disclosed and wishes to give evidence in such a manner that he would not be seen or heard by both the accused and his counsel, the Public Prosecutor may make an oral application to the Court for the procedures in this section to apply.

(2) For the purpose of satisfying itself as to the need to protect the identity of the witness, the Court shall hold an inquiry *in camera* by questioning the witnesses concerned or any other witness in the absence of the accused and his counsel.

(3) If after such inquiry the Court is satisfied as to the need to protect the identity of the witness, the evidence of such witness shall be given in such a manner that the witness would not be visible to the accused and his counsel and further if the witness fears that his voice may be recognised, his evidence shall be given in such manner that he would not be heard by the accused and his counsel.

(4) The evidence given by the witness under subsection (3) shall be given to the accused and his counsel provided that the Court shall cause the evidence leading to the identity of the witness to be concealed.

(5) The Court shall disallow any question by the accused or his counsel to any other witness that would lead to the identification of the witness who has given his evidence under this section.

(6) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person and his counsel.

(7) The Court shall seal all records that may lead to the identification of the witness who has given evidence under this section.

[19] Nowhere is it argued that s. 265A CPC falls within the disputed area of whether it is the Federal Parliament or the State Legislature that should be making that law. In fact, the challenge is one coming under ground (2) as held in *Ah Thian*'s case (*supra*).

[20] The challenge mounted is that s. 265A CPC is inconsistent with art. 5 and art. 8 of the FC.

[21] A cursory reading of the above provision would indicate that there is a substantial departure from the procedure of a normal trial where it has become a basic requirement that a witness giving evidence shall do so in a court accessible to the public and that the accused must be able to see and hear his accusers.

[22] The earliest record of the introduction of the death penalty as can be read from the sacred texts was for murder and even then, upon the eye-witness account of at least two or more witnesses and the accusers must be the first to cast the stone.

[23] With the advancement in forensic science in the field of DNA analysis and CCTV recording, circumstantial evidence has been allowed to sustain a conviction for murder. But always the identities of the witnesses were never concealed and other than some excepted cases where a part of the proceedings may be heard *in camera*, the trial court is always an open court as provided under s. 7 CPC as follows:

> 7. Courts to be open
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> The place in which any criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open and public Court to which the public generally may have access.

[24] Learned counsel for the appellants referred to a decision of the apex Court of Australia in *Assistant Commissioner Michael James Condonation v. Pompano Pty Ltd* [2013] 252 CLR 38 and the *dicta* of French CJ as follows:

> At the heart of the common law tradition is a method of administering justice. That method requires judges who are independent of government to preside over courts held in public in which each party has a full opportunity to present its own case and to meet the case against it. *Antithetical to that tradition is the idea of a court closed to the public, in which only one party, a government party is present, and in which the judge is required by law to hear evidence and argument which neither the other party nor its legal representatives is allowed to hear.* (emphasis added)

[25] Learned counsel for the appellants was also inspired with the following *dicta* of the Court of Appeal in *Lim Guan Eng v. PP* [2017] 1 LNS 1850; [2018] 1 MLJ 433 as follows:

> [21] We were fortified in our finding when viewed from the principle of 'equality of arms'. This principle was considered in the High Court case of *Public Prosecutor v. Mohd Fazil bin Awaludin* [2009] 8 MLJ 579 and which was approved by the Federal Court in *Dato' Seri Anwar bin Ibrahim* at para 12, pp 587-588, as follows:
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> > [12] In *Jarrod Rags v. Magistrates' Court of Victoria* (2008) VCS 1 the Supreme Court of Victoria discussed the principle of 'equality of arms' in the following manner:

[45] The Criminal trial is an accusatory and adversarial process. The person accused is presumed to be innocent and does not have to prove or say anything. The prosecution is the accuser and, from the first to the last, carries the onus proving each element of the offence according to the criminal standard beyond reasonable doubt. *The rationale is that the general objectives of the criminal justice system – finding the truth and attributing criminal responsibility – are best achieved by a trial conducted before an independent and impartial judge, or judge and jury, in which both sides participate according to their best interests ... Equality of arms is an international human rights principle that picks up the language of the battle to explain some aspects of the most important of those rules – the right to a fair trial.*

[46] This is the equality of arms principle, which applies to both civil and criminal trials, as stated by the European Court of Human Rights in *Foucher v. France*:

> The court reiterates ... that *according to the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case on condition that do not place him at a disadvantaged vis a vis his opponent.*

[47] Here is the most elaborate statement of the principle given by Stefania Negri in the *International Criminal Law Review*, which also emphasises it is one of comprehensive application:

> The right to a fair trial entails protecting the equality of arms' principle, an inherent element of the due process of law in both civil and criminal proceedings. *Strict compliance with this principle is required at all stages of the proceedings in order to afford both parties (especially the weaker litigant) a reasonable opportunity to present their case under conditions of equality. Indeed, at the core of the concept of equality of arms' as elaborated in domestic and international case law, is the idea that both parties should be treated in a manner ensuring that they have a procedurally equal position to make their case during the whole course of the trial ...*
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> (emphasis added)

[26] Learned counsel for the appellants also highlighted the danger of collusion where there are a number of witnesses giving evidence under the special procedure for protected witnesses as alluded to by the UK Court of Appeal in *R v. Mayers and Others* [2008] EWCA Crim 2989, [2009] 1 WLR 1915:

A different problem may arise where there are a number of incriminating witnesses whose evidence is to be given anonymously. By definition where two or more anonymous witnesses give important incriminating evidence against the defendant, the evidence of one would not provide either the sole evidence or indeed the decisive evidence against him. When this situation arises, it would be as well to investigate whether there is any, and if so the nature of the link, between the witnesses. Again, the ordinary process of the courts is well familiar with the issue. Questions of possible improper collusion between them, or cross-contamination of one another, should be addressed.

[27] Learned counsel for the appellants also emphasised that in the United Kingdom, this procedure called an anonymity order may only be made upon cogent and compelling reasons such that "an anonymity order should be regarded as the special measure of last practicable resort", as was held by the Court of Appeal in *Mayers*'s case (*supra*).

[28] Learned counsel further referred this court's attention to the *dicta* of Stephen Chung Hian Guan J (later JCA) *Public Prosecutor v. Atik Hussain bin Abu Bakar and Other Cases* [2016] MLJU 968 when a similar procedure under the Witness Protection Act 2009 was sought to be invoked:

[11.10.] It was submitted that any order to make them as protected witnesses as a special measure or to give evidence in a special manner should only be as a last practicable resort, citing two English authorities in support of the submissions: *R v. Mayers* [2009] 1 Cr. App. R. 30; *Reece Donovan, John Kafunda v. R* [2012] EWCA Crim 2749.

[11.11.] These two cases were decided based on the provisions of the English Coroners and Justice Act 2009 and similar provisions in its Criminal Evidence (Witness Anonymity) Act 2008. Section 88 of the 2009 Act provides that a witness anonymity order in criminal proceedings may only be made if three conditions are satisfied ...

[11.12.] In deciding whether the three conditions are satisfied, the judge must also have regard to the several considerations set out in section 89 of the 2009 Act.

[11.13.] In England, witness statements and other documents are provided to the defendant or accused and to the court during pre-trial case management so that the court or judge in undertaking the exercise under s. 88 and s. 89 of the 2009 Act is in a position to evaluate the credibility of the witness concerned, whether the witness's evidence might be the sole or decisive evidence implicating the defendant or accused, whether he has a tendency to be dishonest or any motive to be dishonest in the circumstances of the case having regard to any previous convictions of the witness and to any relationship between the witness and the accused or any associates of the accused.

[11.14.] There are no provisions in this country similar to those in the 2008 Act and 2009 Act, which do not apply. They are very different in scopes and applications from the provisions set out in s. 14 of SOSMA or in the Evidence Act or CPC.

[29] Perhaps learned counsel should also have alerted this court to another *dicta* of the learned judge as follows:

[11.30.] Several countries including Malaysia have enacted similar legislations such as SOSMA and POTA (Prevention of Terrorism Act) to prevent and control terrorism within and outside their respective jurisdictions. The highest courts in some of these countries, where there have been challenges that these legislations were draconian, oppressive, unconstitutional, null, void and or invalid, have ruled that they are constitutional and valid in the interest of national security and public interest: see *Kartar Singh v. State of Punjab* AIR 1995 SCW 2698; *People's Union of Civil Liberties and Another v. Union of India* AIR 2004 SC 456; *A, X and Y, and another v. Secretary of the State for the Home Department* [2002] EWCA Civ 1502.

[11.31.] I also refer to s. 15(1) of CJA which states that the place in which any court is held for the purpose of trying any cause or matter, civil or criminal, shall be deemed an open and public court to which the public generally may have access provided that the court shall have power to hear any cause or matter or any part thereof *in camera* if the court is satisfied that it is expedient in the interest of justice, public safety, public security or propriety, or for other sufficient reason so to do.

(emphasis added)

[30] Granted the decisions on the Commonwealth Courts, be they from the UK or India are not binding on our courts but they certainly would be helpful in assisting us to arrive at our own decision based on the FC.

[31] Learned counsel also alluded to the stringent safeguards that must be followed in the UK where the special procedure for protected witness is being invoked. Section 88 of the Coroners and Justice Act 2009 in the United Kingdom provides as follows:

88 Conditions for making order

(1) This section applies where an application is made for a witness anonymity order to be made in relation to a witness in criminal proceedings.

(2) The court may make such an order only if it is satisfied that Conditions A to C below are met.

(3) Condition A is that the proposed order is necessary:

(a) in order to protect the safety of the witness or another person or to prevent any serious damage to property, or

A (b) in order to prevent real harm to the public interest (whether affecting the carrying on of any activities in the public interest or the safety of a person involved in carrying on such activities, or otherwise).

(4) Condition B is that, having regard to all the circumstances, the B effect of the proposed order would be consistent with the defendant receiving a fair trial.

(5) Condition C is that the importance of the witness's testimony is such that in the interests of justice the witness ought to testify and:

(a) the witness would not testify if the proposed order were not C made, or

(b) there would be real harm to the public interest if the witness were to testify without the proposed order being made.

(6) In determining whether the proposed order is necessary for the purpose mentioned in subsection (3)(a), the court must have regard D (in particular) to any reasonable fear on the part of the witness:

(a) that the witness or another person would suffer death or injury,

(b) that there would be serious damage to property, if the witness were to be identified. (emphasis added)

E **[32]** Section 89 of the Act further provides for the factors that the court shall take into consideration in a witness anonymity order as follows:

89 Relevant considerations

(1) When deciding whether Conditions A to C in section 88 are met in the case of an application for a witness anonymity order, the F court must have regard to:

(a) the considerations mentioned in subsection (2) below, and

(b) such other matters as the court considers relevant.

(2) The considerations are: G

(a) the general right of a defendant in criminal proceedings to know the identity of a witness in the proceedings;

(b) the extent to which the credibility of the witness concerned would be a relevant factor when the weight of his or her evidence comes to be assessed; H

(c) whether evidence given by the witness might be the sole or decisive evidence implicating the defendant:

(d) whether the witness's evidence could be properly tested (whether on grounds of credibility or otherwise) without his or her identity being disclosed: I

(e) whether there is any reason to believe that the witness:

(i) has a tendency to be dishonest, or

(ii) has any motive to be dishonest in the circumstances of the case having regard (in particular) to any previous convictions of the witness and to any relationship between the witness and the defendant or any associates of the defendant;

(f) whether it would be reasonably practicable to protect the witness by any means other than by making a witness anonymity order specifying the measures that are under consideration by the court.

[33] Learned counsel's industry led him to cases from the European Court of Human Rights and to the case of *Kostovski v. The Netherlands* (1989) ECHR 11454/85 where it was opined as follows:

... If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable.

Testimony or other declarations inculpating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility. The dangers inherent in such a situation are obvious.

...

However, the subsequent use of anonymous statements as sufficient evidence to found a conviction, as in the present case, is a different matter. It involved limitations on the rights of the defence which were irreconcilable with the guarantees contained in Article 6. In fact, the Government accepted that the applicant's conviction was based "to a decisive extent" on the anonymous statements.

45. The Court therefore concludes that in the circumstances of the case the constraints affecting the rights of the defence were such that Mr Kostovski cannot be said to have received a fair trial.

(emphasis added)

[34] Learned counsel submitted that the above decision is consistent with the Recommendation No. R (97) 13, Council of Europe that reads as follows:

10. Where available and in accordance with domestic law, anonymity of persons who might give evidence should be an exceptional measure. Where the guarantee of anonymity has been requested by such persons and/ or temporarily granted by the competent authorities, criminal procedural law should provide for a verification procedure to maintain a fair balance between the needs of criminal proceedings and the rights of the defence. The defence should, through this procedure, have the opportunity to challenge the alleged need for anonymity of the witness, his/her credibility and the origin of his/her knowledge.

13. When anonymity has been granted, the conviction shall not be based solely or to a decisive extent on the evidence of such persons.

[35] Learned counsel concluded on the unfairness and unconstitutionality of the provision of s. 265A CPC with this cryptic note from *R v. Mayers* (*supra*) as follows:

> 36....The fairness of the trial process as a whole must be preserved, and it is **a deeply entrenched principle of our criminal justice process that a safe conviction cannot be produced by an unfair trial.** (emphasis added)

[36] We do not for a moment doubt the importance of the constitutional issue posed by learned counsel for the appellant and in particular from the submissions of Dato' Sukri bin Haji Mohamed and this court would certainly not be skirting the issue when it should come before it at the proper time. All the research that has gone into this subject is not lost but perhaps would be further honed and harnessed for an exhaustive examination by the court.

[37] One can appreciate both the gargantuan and herculean task of cross-examining a witness whose identity is not disclosed and whom the accused cannot confront.

[38] It is a valid question to ask how is the truth of what is being said under oath be tested if the witness dare not say it in the presence of the person he is accusing or giving evidence against and be heard by the accused.

[39] It is understandable that a witness might need the protection of the State after giving evidence and for that Parliament has passed the Witness Protection Act 2009.

[40] Based on what the Federal Court said in *Alma Nudo Atenza v. PP & Another Appeal* [2019] 5 CLJ 780; [2019] 4 MLJ 1 the appellants are hopeful that they have more than a fair chance of succeeding in the constitutional challenge. The Federal Court there had to decide on the constitutionality of the double presumption of s. 37(d) and s. 37(da) of the Dangerous Drugs Act 1952 introduced by s. 37A and often used by the prosecution to secure a conviction of drug trafficking. Learned counsel for the appellants drew inspiration from the following *dicta* of the Federal Court:

> [108] We pause at this juncture to note that s. 37A of the DDA begins with the phrase 'notwithstanding any written law or rule of law'. For the avoidance of doubt, the words 'rule of law' in s. 37A refer to implied ancillary rules, such as the rules of procedure or evidence (see FAR Bennion, *Statutory Interpretation: A Code* (3rd Ed) (London: Butterworths, 1997) at p 805). It does not purport to exclude the Rule of Law as a legal concept. If it were to be interpreted otherwise then that would be a rule by law and could not be within the ambit of the term law in art 5(1) of the FC and hence unconstitutional. It must also be emphasised here that the principle of the rule of law, being a constitutional fundamental, cannot be abrogated by mere statutory words.

> [109] Accordingly, art 5(1) which guarantees that a person shall not be deprived of his life or personal liberty (read in the widest sense) save in accordance with law *envisages a state action that is fair both in point of procedure and substance. In the context of a criminal case, the article enshrines an accused's constitutional right to receive a fair trial by an impartial tribunal and to have a just decision on the facts.*
>
> ...
>
> [150] Based on the factors above – the essential ingredients of the offence, the imposition of a legal burden, the standard of proof required in rebuttal, and the cumulative effect of the two presumptions – *we consider that s 37A constitutes a most substantial departure from the general rule, which cannot be justified and disproportionate to the legislative objective it serves.* It is far from clear that the objective cannot be achieved through other means less damaging to the accused's fundamental right under art 5. In light of the seriousness of the offence and the punishment it entails, *we find that the unacceptably severe incursion into the right of the accused under art 5(1) is disproportionate to the aim of curbing crime, hence fails to satisfy the requirement of proportionality housed under art 8(1).*
>
> [151] *Accordingly, we hold that s. 37A is unconstitutional for violating art 5(1) read with art 8(1) of the FC. The impugned section is hereby struck down.*
>
> (emphasis added)

[41] Whether the substantial deviation in s. 265A CPC from the normal way of adducing evidence violate art. 5 of the FC would be an important issue for the court to decide. Likewise, whether s. 265A CPC is in conflict with the equality and equal protection under art. 8 of the FC would be a question that may have to be decided by the Federal Court one day.

[42] Whilst the time is always right to do that which is right, there is a proper time and place for everything under the sun as the writer of Ecclesiastes so poignantly remind us.

[43] More importantly, translated into the language of the law, was the High Court Judge in exercising his discretion not to refer the question of the constitutionality of s. 265A CPC a proper exercise of his discretion which this court should not disturb.

[44] The High Court certainly has jurisdiction to hear a constitutional issue raised before it in its exercise of original jurisdiction or in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a subordinate court.

[45] However the question before us is a much narrower one at this juncture. It is the question of whether the issue of the constitutionality of s. 265A CPC should be decided by the High Court here and now and from there, the dissatisfied party appeals to the Court of Appeal and then to the Federal Court or should the matter be decided by the High Court, before which the issue was raised, at the end of the trial.

[46] Any party dissatisfied with its final decision after trial, be it ending in a conviction and sentence or an acquittal may then appeal to the next stage to the Court of Appeal and canvass all grounds of appeal including the issue of constitutionality of the said provision.

Whether The High Court Had Exercised Its Discretion Correctly When It Refused To Allow An Application For Referral To The Federal Court Made Under Section 84 CJA In The Circumstances Of This Case

[47] Section 84 CJA itself gives the discretion to the High Court when a reference is made for referral of a constitutional question to the Federal Court. It reads as follows:

> Reference of constitutional question by High Court
>
> 84(1) *Where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.*
>
> (2) An order staying proceedings under this section may be made by the Judge of his own motion or on the application of any party and shall be made at such stage of the proceedings as the Judge may see fit having regard to the decision of such questions of fact as may be necessary to be settled to assist the Federal Court in deciding the question which has arisen and to the speedy and economical final determination of the proceedings.
>
> (3) Where an order for stay of proceedings has been made under this section the Judge shall state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case which so far as may be possible shall state the said question in a form which shall permit of an answer being given in the affirmative or the negative.
>
> (4) Where a Judge shall have stated a special case under this section the same shall be transmitted to the Federal Court in accordance with the rules of court of the Federal Court.

[48] The legislative history to s. 84 CJA was highlighted and elucidated by the majority in *Datuk Seri Anwar Ibrahim v. Government of Malaysia & Anor* [2020] 3 CLJ 593 as follows:

> History Of s. 84 CJA
>
> [17] The constitutional role of the Federal Court is reflected in the wording and application of s. 84 of the CJA. The referral jurisdiction of the Federal Court is provided under art. 128(2) of the FC:
>
> > Without prejudice to any appellate jurisdiction of the Federal Court, where in any proceedings before another court a question arises as to the effect of any provision of this Constitution, the Federal Court shall have jurisdiction (subject to any rules of court

> regulating the exercise of that jurisdiction) to determine the question and remit the case to the other court to be disposed of in accordance with the determination.

[18] The original form of the present s. 84, which provides for the reference of constitutional questions by the High Court, was found in s. 84 of the CJA. Before amendment, s. 84(1) initially read:

> Where in any proceedings in any High Court a question arises as to the effect of any provision of the Constitution, the Judge hearing such proceeding **shall** stay the same on such terms as may be just to await the decision of such question by the Federal Court. (emphasis added)

[19] The original mandatory language of s. 84 was inconsistent with the constitutional scheme (*Gerald Fernandez v. Attorney-General Malaysia* [1970]1 LNS 27; [1970] 1 MLJ 262 at 264), in that it deprived the High Court of power to decide constitutional questions arising in proceedings before it (Parliamentary Hansard, 16 October 1964). Thus, *the CJA was swiftly amended in 1964 itself by substituting the word "shall" (embolden above) with "may". The purpose of the amendment was to ensure conformity with the constitutional scheme, and to avoid any impression that s. 84 had the "effect of extending the exclusive jurisdiction of the Federal Court to decide constitutional questions beyond the limits on that exclusive jurisdiction prescribed by the Constitution*" (explanatory statement to the Courts of Judicature (Amendment) Bill 1964).

[20] The effect of the amendment made it clear that *there is no obligation on the part of the High Court to refer any constitutional question arising before it to the Federal Court; it may itself dispose of the question* (*Hashim Saud v. Yahaya Hashim & Anor* [1973] 1 LNS 43; [1973] 2 MLJ 85 at 85; M Suffian bin Hashim, *An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Jabatan Chetak Kerajaan, 1972) at 86).

[21] In fact, "the Federal Court has been at pains to point out that, although constitutional issues can be referred to it by lower court, decided and then remitted to the lower court, the lower courts should decide issues of constitutionality themselves in the first instance" (*Harding* (*supra*) at 138). The point was emphatically made by Suffian LP in *Mark Kading v. PP* [1982] 1 LNS 15; [1982] 2 W, J 120 at 123-124:

> [I]t would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v. Attorney-General* [1970] 1 LNS 27; [1970] 1 MLJ 262, 264) and decided the case one way or the other. If he had done that and there was an appeal to us, the whole matter would have been disposed of in two steps. *By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the*

A *charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s. 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.*

[22] Thus the drafters of the FC and CJA envisaged that the reference
B jurisdiction under (now) *s. 84 of the CJA was not to be exercised automatically or invariably in every case. The High Court should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court. Not all cases should be referred to the Federal Court for determination.* It is implicit in the constitutional and statutory scheme that the "special cases" suitable to be referred to and determined by the
C Federal Court must necessarily be subject to certain conditions.

[23] Section 84 of the CJA does not expressly indicate the factors to be considered in determining whether a case is suitable to be referred to and determined by the Federal Court. Where the statute conferring a jurisdiction or discretion is silent as to how precisely it must be exercised,
D it is well established that the court has the power to develop common law principles to guide the exercise of its discretion. (emphasis added)

[49] That the High Court certainly does not have to forthwith and immediately refer a constitutional question of law raised before it when it is exercising its original, appellate or revisionary jurisdiction is beyond debate.
E See also the Federal Court's decision in *Gerald Fernandez v. Attorney-General, Malaysia* [1970] 1 LNS 27; [1970] 1 MLJ 262.

[50] It can and in this case did proceed to dismiss the application for referral to the Federal Court under s. 84 CJA and continued with the criminal trial in the exercise of its original jurisdiction.

F **[51]** In doing so the learned High Court Judge held as follows:

23. Oleh itu, saya berpendapat tiada keperluan untuk saya menggunakan budibicara saya di bawah Seksyen 84 Akta Mahkamah Kehakiman 1964 untuk merujuk isu yang dibangkitkan atau dipertikaikan ini kepada Mahkamah Persekutuan dan menangguhkan perbicaraan kes ini kerana
G **ianya tidak akan membawa kesan penyelesaian penentuan pertikaian ini dengan lebih cepat dan menjimatkan sebagaimana kehendak seksyen 84 itu sendiri** ... (emphasis added)

[52] That is a decision that the learned High Court Judge was perfectly entitled to arrive at. He may be right or wrong and the matter can certainly
H be raised on appeal at the end of the criminal trial when the learned judge decides on whether to convict or acquit.

[53] Having decided that there was no question arising as to the effect of any provision of the Constitution, he is then to continue with the proceedings before him, which he did and so he did not stay the proceedings.

I

[54] The Federal Court in *PP v. Gan Boon Aun* [2017] 4 CLJ 41; [2017] 3 MLJ 12 explained the options available to a High Court Judge in a s. 84 CJA application made before him as follows: A

> [6] Pursuant to s. 84 of the CJA, 'where in any proceedings ... a question arises as to the effect of any provision of Constitution the judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court', The High Court shall settle the facts to assist the Federal Court in deciding the question, and state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case. *There cannot be a stay of proceedings if the High Court decides that no question arises as to the effect of any provision of the Constitution. The proceedings are to continue.* If it were a reference under s. 30 of the CJA, the High Court shall transmit the record back to the trial court for continuation of the proceedings. *There can only be a stay of proceedings if the High Court decides that a question arises as to the effect of any provision of the Constitution, in which case, the High Court shall state the question in the form of a special case and settle the facts to assist the Federal Court in deciding the question. The High Court is to await the decision of the question by the Federal Court. It is not within the sphere of the High Court to decide on the question.* But in the instant case, where it was not supposed to, the High Court (not the High Court below) decided on the question and ruled (see *Public Prosecutor v. Gan Boon Aun & Anor* [2012] MLJU 1225) that s. 122(1) was unconstitutional, and acquitted the respondent and Khiudin bin Mohd. On appeal, which was only lodged against the respondent, the Court of Appeal held (see *Public Prosecutor v. Gan Boon Aun* [2015] 6 MLJ 32) that s. 122(1) was constitutional. On further appeal, the Federal Court ruled (see *Gan Boon Aun v. Public Prosecutor* [2016] 4 MLJ 265) that only the Federal Court has the jurisdiction, in a s. 30 reference, to determine a question as to the effect of any provision of the Constitution, that the High Court in *Public Prosecutor v. Gan Boon Aun & Anor* [2012] MLJU 1225 had no jurisdiction to decide on that question or to acquit the respondent, and that the Court of Appeal in *Public Prosecutor v. Gan Boon Aun* [2015] 6 MLJ 32, which was only seized with jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction or in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a sessions court, had no jurisdiction to hear the so called 'appeal' against the decision made by the High Court. The Federal Court then struck out what it held was an incompetent appeal, set aside the orders of the High Court and Court of Appeal, and remitted the matter back to the High Court with an order that the High Court judge shall consider, if any, and state the question, which in his/her opinion has arisen as to the effect of the provision of the Constitution in the form of a special case which so far as may be possible shall state the question in a form which shall permit of an answer being given in the affirmative or the negative and transmit the same to the Federal Court for determination pursuant to s. 84(3) and (4) of the

B C D E F G H I

A CJA. Pursuant to that latter order of the Federal Court, the High Court (a different court) framed and referred the aforesaid 'constitutional issues' to this court for determination. (emphasis added)

[55] The learned High Court Judge had exercised his discretion correctly. His decision on the constitutionality of s. 265A CPC would in no way B dispose of the case fully and finally and the right of the accused persons to appeal against the final decision of the High Court after trial would not be jeopardised in any way. We can consider the various permutations below.

[56] At the end of the prosecution's case the High Court may decide to call for the defence on the charge or reduce the charge to one under s. 304 Penal C Code. The High Court based on the evidence adduced may find that a *prima facie* case has not been made out and so discharge and acquit the accused persons.

[57] Assuming the defence is called, at the end of the trial the High Court may, even with the evidence adduced under s. 265A CPC, acquit the accused D persons of the murder charge altogether in which case the accused persons would not be the one appealing but the Public Prosecutor.

[58] At the end of the trials the High Court may, because of the evidence adduced under s. 265A CPC and taken together with other evidence, convict the accused persons of the murder charge or a reduced charge, in which case E the accused persons may appeal against the conviction and raise the issue of the constitutionality of s. 265A CPC on appeal to the Court of Appeal.

[59] The Court of Appeal would then, at that stage, decide on the constitutionality of the provision of s. 265A CPC and if it is held to be F unconstitutional, the evidence adduced under s. 265A CPC would be expunged and the court will decide on whether, absent such evidence, would the conviction be safe.

[60] That was precisely the point emphasised by Suffian LP in *Mark Koding v. Public Prosecutor* [1982] 1 LNS 15; [1982] 2 MLJ 120 at 123-124:

G

> [I]t would have been better if the learned Judge had not referred this matter to us but instead had himself decided the constitutional questions which arose (he had jurisdiction to do so: *Fernandez v. Attorney-General* [1970] 1 LNS 27; [1970] 1 MLJ 262, 264) and decided the case one way or the other. If he had done that and there was an appeal to us, the whole H matter would have been disposed of in two steps. *By referring this matter to us without deciding it one way or another, should there be an appeal from his decision on the charge, this matter would come back to us a second time, and thus will have to be disposed of in four steps: causing delay and additional expense, instead of helping in the words of s. 48(2) of the Courts of Judicature Act, towards the speedy and economical final determination of these proceedings.*

I (emphasis added)

[61] At this stage where the prosecution had not even concluded its case, this appeal is incompetent.

Whether The Decision Of The High Court To Dismiss The Section 84 CJA Application Is An Appealable Decision Before The Disposal Of The Criminal Trial

[62] When dismissing the accused person's application, the High Court had stated briefly that the provision is used not necessarily in a case of organised crime but may be applicable to all offences tried before it – paras. 19-24 of the grounds of judgment. The learned High Court Judge had made reference to the Hansard on the statement made by the Minister when introducing the Bill.

[63] The learned High Court Judge also held that as s. 265A CPC is a special provision and that it would trump and take precedence over a general provision in s. 264 CPC and that art. 5 of the FC itself provides its own qualification and exception in the phrase "save in accordance with law." See para. 38 of the grounds of judgment.

[64] On art. 8 the learned High Court Judge held that the impugned provision in s. 265A CPC comes within the exception of reasonable classification. See paras. 47-50 of the grounds of judgment.

[65] Whether the High Court's decision in dismissing the application under s. 84 CJA is appealable would depend on whether the decision is one that comes within the meaning of a "decision" under the CJA.

[66] Section 50(1) CJA provides for appeal against any decision made by the High Court in the exercise of its original jurisdiction and in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court. It reads:

> 50. Jurisdiction to hear and determine criminal appeal.
>
> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:
>
> (a) in the exercise of its original jurisdiction; and
>
> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[67] Section 50(2) CJA addressed the issue of jurisdiction with respect to appeals from the High Court for a matter that had originated in the Magistrate's Court as follows:

A (2) An appeal shall lie to the Court of Appeal with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrate's Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has effected the event B of the appeal or revision.

[68] As to what is meant by a "decision", s. 3 CJA defines it as follows:

'decision' means **judgment, sentence or order,** but **does not include any ruling** made in the course of trial or hearing of any cause or matter **which does not finally dispose of the rights of the parties;** (emphasis added) C

[69] The above definition of the word "decision" in s. 3 CJA was introduced by an Amendment Act A1031 of 1998 and prior to the amendment it reads:

'decision' means judgment, sentence or order. D

[70] Clearly, the Legislature in making the amendments had wanted to avoid the mischief of an appeal against any interlocutory decision of a trial court that does not have the effect of finally disposing of the rights of the parties before the court. As an appeal is a creature of statute, one must look at the meaning of a "decision" to determine the type of order of the court E that is appealable.

[71] The Court of Appeal case of *Public Prosecutor v. Mohamed Shahabuddin Mohamed Ali & Ors* [2018] 8 CLJ 535 at p. 543 gave some guidance in ascertaining if a decision has finally disposed of the rights of the parties as F follows:

(1) Decisions of the High Courts have generally been held to be appealable only if they have three attributes, ie, *they must be final in effect, definitive of the rights of the parties, effectively dispose of a substantial part of the relief claimed in the main proceedings and it does not leave anything to be done in the trial with respect of the merits of the case.* The right of appeal against any G decision of the High Court in respect of criminal matters does not include any ruling made in the course of a trial or hearing of any cause or matters which does not finally dispose of the rights of the parties. *In a broad term, a final decision is one that disposes of a cause on its merits and leave no question open for judicial determination.* (emphasis added)

H **[72]** Learned counsel for the appellants submitted that the decision of the High Court in dismissing the application under s. 84 CJA has all the characteristics of a final decision in that it is definitive and final in effect in the sense that the constitutional issues raised by the appellants have been exhausted by the High Court and it leaves no question open for judicial I determination. It was further submitted that the decision has finally disposed of the rights of the appellants and therefore is appealable to the Court of Appeal.

[73] With respect, we are not persuaded. The admission of the evidence under s. 265A CPC would mean that together with the other evidence admitted, the High Court would have to weigh and consider if at the end of the trial the prosecution has proved its case beyond a reasonable doubt and that the conviction is safe. That final decision as to whether to convict or acquit or to convict on a lesser charge would be a final decision that disposes of the rights of the parties and thereafter the party dissatisfied with the decision may appeal to the Court of Appeal.

[74] Otherwise, there may well be many appeals arising from rulings, orders and even decisions made in the course of a trial that would skirt and scuttle the smooth progress of a trial to completion. Parties appealing would then be applying for a stay of the criminal proceedings in the meanwhile and that would further delay the trial.

[75] This was precisely the point that the Federal Court tried to drive home in its brief sketch of the reasons behind the amendment to the definition of "decision" in s. 3 CJA in *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; [2010] 6 MLJ 585 which came into force on 31 July 1988. It was in the context of the High Court's ruling on an application by the appellant for the statement of the complainant recorded under s. 112 CPC to be produced for examination by the appellant in a case where the appellant was facing an ongoing criminal trial for a charge under s. 377B of the Penal Code.

[76] The High Court had dismissed the application on the ground that the ruling was not a "decision" within the meaning of s. 3 CJA and hence not appealable. The Court of Appeal agreed. The appellant appealed further to the Federal Court and in dismissing the appeal, the Federal Court observed as follows:

> [24] The underlying reason behind the amendment to the definition of "decision" in s. 3 of the CJA is **to stop parties from stalling before a trial court by filing appeal after appeal on rulings made by the trial court in the course of a trial.** Apart from that the definition of "decision" by itself is sufficiently clear and it is the court's duty to give effect to the same. Justice demands that cases should move without unnecessary interruption to their final conclusion. That is what the amendment seeks to achieve as evident from the explanatory statement to the Bill, which reads.
>
> 2. Clause 2 seeks to amend section 3 of Act 91.
>
> At the moment, in the course of hearing a case, if the court decides on the admissibility of any evidence or document, the dissatisfied party may file an appeal. If such appeal is filed, the court has to stop the trial pending the decision of the appeal by the superior court. This cause a long delay in the completion of the hearing,

A especially when an appeal is filed against every ruling made by the trial court. The amendment is proposed in order to help expedite the hearing of cases in trial courts.

Quite apart from the explanatory statement to the Bill the definition of "decision" by itself to our mind, is sufficiently clear and it is the duty of
B the court to give effect to the same. *Justice demands that cases should move without unnecessary interruption to their final in conclusion. That is what the amendment seeks to achieve. The right of a party who is aggrieved by a ruling, after all, is not being compromised, as the party can always raise the issue during the appeal, if any, to be filed after the trial process is brought to its conclusion.*
(emphasis added)

C **[77]** We accept that just because a matter is 'interlocutory' in nature as in before a final disposal of the trial, it does not necessarily mean that the ruling is not a "decision" that is appealable.

[78] The Federal Court in *Dato' Seri Anwar Ibrahim v. PP* [2010] 4 CLJ 265;
D [2010] 2 MLJ 312; had to decide whether an order made by the trial judge pursuant to s. 51 and/or s. 52 of the CPC is appealable. The Federal Court held that the order was a final order as it finally disposed of the rights of the parties and therefore it was appealable. It held as follows:

[24] Section 51 of the CPC gives the appellant certain rights. These
E 'rights', in our view, are the rights referred to under s. 3 of the CJA. The application by the appellant to have access to the various documents and materials is in fact an exercise of that right given to him by s. 51 of the CPC ....

The order made by the High Court in allowing access to some of the documents and
F *materials has, in effect, disposed of the rights of the appellant under s. 51 of the CPC. It is not an interlocutory order, nor one that was made in the course of a trial. It stands on its own.*

[25] Further, the application made by the appellant stands independently of the trial. *It sought for a determination of the appellant's right pursuant to s 51 of the CPC. Thus, the order made by the learned judge on that application is a final*
G *order that has finally disposed of the rights of the appellant.* It has disposed of the matter in dispute. It is therefore appealable. We therefore affirm this part of the judgment of the Court of Appeal dated 6 November 2009.
(emphasis added)

[79] However, with respect to whether the decision of a trial judge to
H dismiss an application that he be recused from hearing a criminal trial before it in the High Court which application was made after the judge had found that the prosecution had proved a *prima facie* case against the accused, the Court of Appeal in dismissing the accused's appeal in *Dato' Seri Anwar Ibrahim v. PP* [2011] 7 CLJ 253; [2011] 5 MLJ 535 remarked as follows:

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> [43] Likewise here, it is certainly bad policy for this panel to depart from the decision of this court in *Dato' Seri Anwar Ibrahim v. Public Prosecutor*. The law as to the ruling of the learned trial judge in refusing to recuse himself from hearing or continue to hear the criminal trial of the appellant for the sodomy charge is quite settled. It is not appealable. *The law as it stands, bars the filing of an appeal against such rulings made by the learned trial judge. The law only allows appeals against a judgment, sentence or order but it expressly excludes all appeals against all rulings made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.* With the amendment to the definition of the word 'decision' in s 3 of the CJA which was introduced by an Amendment Act A1031 of 1998 with effect from 31 July 1998, parties are stopped from filing one appeal after another against rulings made by the trial court in the course of the trial bearing in mind that such rulings are not final and would not have the effect of finally disposing of the rights of the parties. (emphasis added)

[80] Lest it be thought that it is always the accused persons that are aggrieved with a ruling or decision in the course of a trial that does not finally dispose of the rights of the parties, the same provisions on what is an appealable "decision" apply with equal force to the prosecution as well.

[81] Thus when a High Court trial judge reduces a murder charge to one of culpable homicide at the end of the prosecution's case, such a ruling or "decision" is not appealable as was found by the Court of Appeal in *PP v. Mohamed Shahabuddin Mohamed Ali& Ors* [2018] 8 CLJ 535; [2018] MLJU 434 as follows:

> [23] So too here. We are of the considered opinion that *the decision of the learned trial Judge in reducing the charge from the offence of murder under section 302 of the Penal Code to one of culpable homicide under section 304(a) of the same Code and in calling the respondents to enter their defence on the amended charge is not a decision within the meaning of section 3 of the CJA and, therefore, is not appealable.*
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> [24] In this instant appeal, the respondents were scheduled to plead on amended charge on 7.9.2017. However, the trial was postponed due to the appeal filed by the PP against the decision of the learned trial Judge in amending the charge. Certainly, the decision of the learned trial Judge has not finally dispose of the rights of the parties. *The learned trial Judge had not made a final determination of the rights of the parties at this stage. Something still had to be done by the learned trial Judge, ie, to hear the respondents, defence and make a decision* pursuant to section 182A of the Criminal Procedure Code. Only a decision at the close of the defence's case would effectively disposed the rights of the parties. Further, to have a final decision in this case, the respondents must be convicted and sentenced or discharge and acquitted, as the case may be. It would, in our view, be incongruous to allow the PP to appeal to this Court before the final judgment is meted out by the trial court.

A [25] Our courts have applied a "salutary general rule" in criminal and civil proceedings for many years that appeals are not entertained piecemeal. Decision of the High Courts have generally been held to be appealable only if they have three attributes. They must be final in effect, definitive of the rights of the parties, effectively dispose of a substantial part of the relief claimed in the main proceedings and it does no leave anything to
B be done in the trial with respect of the merits of the case. In other words, the rule, *in general, permits an appeal to be taken only from a final decision which dispose of all the issues presented in the trial. Quite obviously, all the issues in the case at bench were not disposed of if the respondents have yet to testify in their defence.*

[26] The PP would not be prejudiced because at the end of the case, it
C would still have the right to appeal to the Court of Appeal and further to the Federal Court against the decision of the learned trial Judge. The PP may still impugn the ruling of the learned trial Judge as part of its grounds of appeal. (emphasis added)

[82] In *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321
D the Court of Appeal when deliberating on the meaning of "decision" in s. 3 CJA and the criminal jurisdiction of the Court of Appeal under s. 50 of the same Act with respect to a decision on a bail application by the High Court, held at p. 555 (CLJ); p. 335 (MLJ) para F as follows:

A decision made pending the trial of the charges against the appellant is not, in our
E *considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights.* A decision on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not
F appealable to the Court of Appeal. (emphasis added)

[83] The learned DPP also referred the court to the case of *Saad Abas & Anor v. PP* [1998] 4 CLJ 575; [1999] 1 MLJ 129, where the Court of Appeal explained the meaning of a "decision" in s. 50(2) CJA at p. 587 (CLJ); p. 138 (MLJ) as follows:

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So, for the purpose of s. 50(2), this court has to first ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and **it would only happen after a decision had been made at the close of the defence.** (emphasis added)

H **[84]** See also *PP v. Letchumanan Suppiah* [2009] 5 CLJ 652, *Maleb Su v. PP & Another Case* [1984] 1 CLJ 378; [1984] 2 CLJ (Rep) 232 and *Lim Hung Wang & Ors v. PP* [2011] 7 CLJ 318; [2011] 9 MLJ 752.

[85] Our courts have not allowed an appeal from the following, by no
I means exhaustive:

(i) A finding of a *prima facie* case by a High Court on appeal from a decision of a Magistrate in acquitting the accused persons at the end of the prosecution's case – *Saad Abas & Anor v. PP* [1991] 1 MLJ 124;

(ii) A decision of the Court of Appeal in directing the accused to enter his defence and remitting the case back to the High Court for the defence to be heard – *PP v. Letchumanan Suppiah* [2009] 5 CLJ 652; [2009] 5 MLJ 597;

(iii) A decision not to admit a cautioned statement or a statement made by an accused before a Magistrate;

(iv) A decision not to have a s. 112 CPC statement produced to the accused – *Dato' Seri Anwar Ibrahim v. PP* [2010] 9 CLJ 625; [2010] 6 MLJ 585;

(v) A decision not to strike out a charge – *Tan Hoo Eng v. PP* [2019] 1 LNS 893; [2019] 6 MLJ 471, *Ahmad Zubair Hj Murshid v. PP* [2014] 9 CLJ 289; [2014] 6 MLJ 831;

(vi) A decision not to allow or to allow a witness to be impeached;

(vii) A decision by the court to amend a charge to a reduced charge at the end of the prosecution's case – *PP v. Mohamed Shahabuddin Mohamed Ali & Ors* [2018] 8 CLJ 535; [2018] MLJU 434;

(viii) A decision on a bail application – *Dato' Seri Anwar Ibrahim v. PP* [1999] 1 CLJ 537; [1999] 1 MLJ 321;

(ix) A decision of the trial judge not to recuse himself from hearing the case – *Dato' Seri Anwar Ibrahim v. PP* [2011] 7 CLJ 253; [2011] 5 MLJ 535;

(x) A decision to not disqualify a senior DPP from acting for the prosecution – *Dato' Sri Mohd Najib Hj Abdul Razak v. PP* [2019] 1 LNS 1837; [2019] 5 MLJ 623; and

(xi) A decision to not disqualify a counsel from acting for an accused in an application by the prosecution – *PP v. Datuk Haji Wasli Mohd Said* [2015] 1 LNS 14; [2015] 3 MLJ 35.

[86] In the current trial before the High Court, the prosecution had not closed its case yet when the objection was raised on what is said to be a rather unfair and unconstitutional procedure of allowing some witnesses to give evidence without their identity being disclosed and in the absence of counsel for the accused persons and the accused persons.

[87] The decision of the High Court Judge to dismiss the application of the accused persons and to proceed with the trial, no matter how repulsive it may be to the accused persons, at this stage, does not amount to an appealable "decision" within the meaning of s. 50(1) CJA read with s. 3 CJA.

A **Pronouncement**

[88] We can understand that learned counsel for the appellants would feel the rightness and righteousness of their stand on the constitutionality of s. 265A CPC, enamoured as they are by the copious research that they have done on the subject. However the right and ripe time for appeal had not
B arrived yet.

[89] All is not lost as they can reserve their arguments at an opportune time should the decision at the end of the trial be against their clients, the accused persons, at the criminal trial in the High Court.

C **[90]** We are concerned here with jurisdiction and having found no error in the High Court's exercise of its discretion to dismiss the application under s. 84 CJA, the matter should be taken up in the fullness of time when the decision on the constitutionality of s. 265A CPC would subsume into the ultimate decision at the end of the trial that would finally dispose of the rights
D of the parties.

[91] In the event that the final decision is against the accused person as in a conviction of the same charge or even a reduced charge, the accused persons as appellants here are at liberty to appeal with no prejudice to their rights whatsoever in canvassing all arguments on both the inadmissibility of
E the evidence adduced under s. 265A CPC and the unconstitutionality of the provision.

[92] This appeal, being incompetent, must therefore be struck out and we so order.

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